

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VITAL PHARMACEUTICALS, INC., et
al.,

Movants,

v.

TIKTOK INC.,

Respondent.

Case No. 2:22-mc-0090 SVW (PVCx)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
COMPEL TIKTOK INC. TO
COMPLY WITH OUT-OF-DISTRICT
SUBPOENAS (Dkt. No. 1)**

I.

INTRODUCTION

On April 11, 2022, movants Vital Pharmaceuticals, Inc., doing business as Bang Energy, and its CEO, Jack Owoc (collectively, “Movants”), filed a motion to compel respondent TikTok Inc. to comply with two out-of-district subpoenas issued in the matter of *UMG Recordings, Inc., et al. v. Vital Pharmaceuticals, Inc., et al.*, Case No. CV 21-60914 WPD (S.D. Fla.), which is currently pending in the Southern District of Florida (the “Florida Action”). (“Motion,” Dkt. No. 1). The Motion is supported by the declaration of Jill J. Ormond (“Ormond Decl.”) and accompanying exhibits (“Exhs. 1-12”).¹ TikTok

¹ Ormond’s declaration is docketed at Dkt. No. 1-1; each of its twelve exhibits is separately docketed at Dkt. Nos. 1-2 through 1-13. The exhibits are not consecutively paginated as a set, and the two subpoenas that are at issue in this Motion, attached as

1 filed an Opposition on April 19, 2022, (“Opp.,” Dkt. No. 7), supported by the declaration
2 of David Mattern (“Mattern Decl.,” Dkt. No. 7.1), and accompanying exhibits. (“Exhs.
3 A-B,” Dkt. Nos. 7.2-7.3).² On April 26, 2022, Movants filed a Reply. (“Reply,” Dkt. No.
4 9).

5
6 On May 6, 2022, the Friday before the then-scheduled May 10, 2022 hearing,
7 Movants filed an 82-page Joint Stipulation without explanation or prior authorization
8 from the Court.³ (“Jt. Stip.,” Dkt. No. 17). The Joint Stipulation appears to abandon
9 some arguments in the Motion. For example, the original Motion confusingly sought
10 compliance with both the First and Second Subpoenas, even though the First Subpoena
11 appeared to have been entirely superseded by the Second Subpoena. Additionally, by its
12 lack of specificity, the Motion suggested that the entirety of the Second Subpoena was at
13 issue, whereas the Joint Stipulation more clearly identifies the specific requests for which
14 a further response is requested. The declarations and attached exhibits that accompanied
15 the Motion and the Opposition were not re-submitted with the Joint Stipulation.
16 Accordingly, the Court assumes that Movants’ intent was that the Joint Stipulation would
17 supersede the prior briefing, but that the declarations and exhibits submitted by both
18

19 Exhibits 3 and 8, are not consecutively paginated internally. Accordingly, the Court will
20 cite to the subpoenas by name (“First Subpoena,” “Second Subpoena”), followed by the
21 CM/ECF-generated page numbers for the subpoenas on the Court’s docket, which count
22 the exhibit cover as “page one.” All other exhibits attached to Ormond’s Declaration will
23 be cited to by exhibit number, followed by the internal pagination for that exhibit. The
24 Court reminds counsel for both sides that Local Rule 11.3-3, which provides “[a]ll
25 documents shall be numbered consecutively at the bottom of each page,” applies to
26 exhibits as well as to briefs. C.D. Cal. L.R. 11.3-3.

27 ² The Court will cite to both exhibits attached to Mattern’s declaration by exhibit letter
28 and the CM/ECF-generated page numbers for that exhibit on the Court’s docket.

29 ³ Local Rule 7-10 provides that “Absent prior written order of the Court, the opposing
30 party shall not file a response to the reply.” The Local Rules do not contemplate a
31 situation in which a party files a motion twice, once under Local Rule 7, then, on the eve
32 of the hearing, again under Local Rule 37. However, the intent of Local Rule 7-10 is that
33 once a motion-opposition-reply are filed, briefing is closed without prior authorization of
34 the Court. By double-briefing this dispute, Movants have unnecessarily burdened both the
35 Court and TikTok with duplicative, though not exactly identical, statements of the parties’
36 positions.

1 parties would still apply. While Movants' manner of presenting this discovery dispute to
2 the Court is highly irregular because the Joint Stipulation more clearly articulates the
3 parties' positions, especially Movants', and should have been filed in the first instance, the
4 Court will excuse Movants' procedural deficiencies and consider the arguments as
5 presented in the Joint Stipulation. However, even though the Court will primarily rely on
6 the Joint Stipulation for the organization of this Order, it may still refer to the Motion-
7 Opposition-Reply when warranted.⁴

8
9 On May 31, 2022, the Court held a hearing on the Motion via Zoom. For the
10 reasons stated below and on the record at the hearing, the Motion is GRANTED IN PART
11 and DENIED IN PART. TikTok shall serve supplemental written responses and produce
12 responsive documents, if any, to the production requests for which a supplemental
13 response is required by this Order within fourteen days of the date of this Order. If no
14 documents exist that are responsive to a production request for which a supplemental
15 response is required, the response shall affirmatively so state. TikTok shall present a
16 corporate witness or witnesses to testify consistent with this Order at a mutually agreeable
17 date and time, but in no case not later than thirty days from the date of this Order.

18 19 II.

20 BACKGROUND FACTS

21
22 Bang Energy is a brand of energy drink that promotes its products on social media,
23 at in-person events, and in venues where the drinks are sold, among other places. (Jt. Stip.

24
25 ⁴ The Court notes that because of the seemingly premature submission of the Motion, the
26 parties were required to address issues that are now plainly moot. For example, one of
27 TikTok's challenges to the First Subpoena was that it named an improper location for
28 compliance. Had Movants not insisted on demanding compliance with the First Subpoena
as well as the Second Subpoena in the Motion, that issue would have been avoided.
Similarly, if Movants had presented this discovery dispute in a Joint Stipulation in the first
instance, TikTok would not have been required to brief its position on Movants' failure to
comply with Local Rules 37 and 45. Additionally, TikTok would not have been required
to set out its arguments twice, in both the Opposition and the Joint Stipulation.

1 at 1). In the Florida Action, which was filed on April 28, 2021, eight music labels and
2 publishers (collectively, the “Labels”) contend that Movants infringed their copyrights by
3 using their music without a license in short-form commercial videos posted on TikTok
4 through their TikTok accounts, @bangenergy and @bangenergy.ceo. (*See id.* at 1-2;
5 Ormond Decl., Exh. 1 ¶¶ 3-4). In their answer to the Complaint, Movants denied
6 infringement on the ground that their TikTok accounts used “music provided to Bang
7 Energy by TikTok” from the TikTok music library. (Ormond Decl., Exh. 2 ¶ 37).
8 Movants state that they believed, in reliance on alleged representations by TikTok, that
9 because the songs were supplied by TikTok’s music library, they could be used in video
10 posts without infringement through TikTok’s licenses with the Labels. (Jt. Stip. at 2).
11 Movants also raised in their answer the affirmative defense of consent and license,
12 asserting that the Labels’ claims “are barred by [the Labels’] license, consent, and
13 acquiescence to the use alleged as infringement.” (*Id.*; *see also* Ormond Decl., Exh. 2 at
14 13 (affirmative defense no. 4)).

15
16 TikTok’s predecessor company, Musical.ly, first entered into an agreement for the
17 use of music with the Labels in 2016. (Jt. Stip. at 7). TikTok itself launched in 2018. (*Id.*
18 at 4). TikTok explains that audio clips from its library of music may be used, but “with
19 clear limitations.” (*Id.*). According to TikTok, “[s]ince before 2016, TikTok’s Terms of
20 Service have instructed users that TikTok may only be used ‘for private, non-commercial
21 use’ and that TikTok grants users no licenses with respect to music.” (*Id.* at 5). TikTok
22 states that it last updated its Terms of Service in February 2019. (*Id.* at 9). That update,
23 like the “materially identical limitations” in Musical.ly’s Terms of Service, expressly
24 provides that TikTok’s services are for private, non-commercial use; that music licenses
25 to TikTok are solely for “personal, non-commercial use,” and that no rights are licensed
26 with respect to the sound recordings and musical works embodied in them “that are made
27 available from or through the service.” (*Id.*) (*citing generally* 2019 Terms of Service,
28 Mattern Decl., Exh. B at 7). In 2020, TikTok launched “an audio library of royalty-free

1 music that may be used for commercial purposes,” although “none of the music that
2 Universal Music accuses Bang Energy of infringing was ever available through that
3 library.” (Opp. at 3-4).

4
5 On July 26, 2021, the court in the Florida Action issued a scheduling order that set
6 February 25, 2022 as the discovery cut-off. (Florida Action, Dkt. No. 17 at 2). However,
7 on March 1, 2022, the court amended the scheduling order and reset the discovery cut-off
8 for April 15, 2022. (*Id.*, Dkt. No. 39 at 2). On April 18, 2022, the Florida Court denied
9 the parties’ respective motions to extend the trial date and pretrial deadlines. (*Id.*, Dkt.
10 No. 49 at 1-2).⁵ As such, the discovery cut-off expired on April 15, 2022, and trial is set
11 to begin on August 15, 2022. (*Id.*, Dkt. No. 39 at 1-2).

12
13 On December 9, 2021, two and a half months before the original discovery cut-off,
14 Movants served a subpoena for documents on TikTok. (“First Subpoena,” Ormond Decl.
15 ¶ 4 & Exh. 3). The subpoena sought four categories of documents: (1) all contracts,
16 agreements, licenses and amendments between Tik Tok and the Labels between 2018 and
17 the present;⁶ (2) all guidelines, directions and communications received by TikTok from
18 the Labels concerning the use of the entities’ sound recordings on TikTok; (3) the name(s)

19
20 ⁵ On April 13, 2022, Bang Energy filed a motion in the Florida Action seeking a three-
21 month continuance of “all relevant deadlines,” including a continuance of the discovery
22 cut-off from April 15, 2022 to July 14, 2022. (Florida Action, Dkt. No. 44 at 7). Bang
Energy sought the continuance “[t]o accommodate the critical TikTok-related discovery”
from both TikTok and the plaintiffs in the Florida Action. (*Id.*).

23 ⁶ The term “Labels” as used in the First Subpoena encompassed not only the eight
24 plaintiffs in the Florida Action (UMG Recordings, Inc.; Capitol Records, LLC; Universal
25 Music Corp.; Universal Music - Z Tunes LLC; Universal Musica, Inc.; PolyGram
Publishing, Inc.; Songs of Universal, Inc.; and Universal Music - MGB NA LLC), but
26 also eight other non-party music labels and publishers. (First Subpoena at 5). However,
27 in the Second Subpoena, which repeated the document requests in the First Subpoena,
28 “Labels” refers solely to the eight plaintiffs in the Florida Action. (Second Subpoena at
6-8). Because the Joint Stipulation concerns only the Second Subpoena, the Court
understands that Movants are not seeking documents and information relating to the eight
non-plaintiff entities listed in the First Subpoena. “Labels” as used in this Order will refer
solely to the eight plaintiffs in the Florida Action.

1 of any company TikTok retained for the purpose of monitoring the use of the Labels’
2 sound recordings; and (4) any and all reports TikTok provided to the Labels regarding the
3 use of the Labels’ sound recordings between 2018 and the present. (*Id.* at 5).

4
5 After receiving an extension, on January 31, 2022, TikTok served written
6 objections to the First Subpoena. (Ormond Decl., Exh. 4). Among other grounds, TikTok
7 objected to the requests to the extent that they sought documents and information related
8 to the eight plaintiffs in the Florida Action, *i.e.*, the “Labels,” because the documents
9 could be obtained from parties to the Action. TikTok objected to the requests that sought
10 documents and information related to the eight other entities listed in the First Subpoena
11 that are not plaintiffs in the Florida Action on the ground that TikTok’s communications
12 with nonparties are irrelevant to the Florida Action. TikTok objected to the request
13 seeking the identity of the company or companies it used to monitor use of the Labels’
14 sound recordings on the ground that the information was not relevant to the claims or
15 defenses in the Florida action. TikTok objected to all of the requests on the grounds that
16 they sought confidential proprietary or trade secret information and failed to comply with
17 Rule 45’s requirements regarding the place of compliance.⁷ In light of these and other
18 objections, TikTok stated that it would not produce documents in response to any of the
19 requests in the First Subpoena. (*Id.* at 5-8).

20
21 On February 2, 2022, the Labels produced a “highly-redacted” copy of their license
22 agreement with TikTok to Movants, after which Movants’ counsel met and conferred with
23

24 ⁷ The First Subpoena designated the place of production as the Miami, Florida office of
25 Bang Energy’s counsel, Gordon, Rees, Scully Mansukhani LLP. (First Subpoena at 2).
26 TikTok is located in Culver City, California, in the Central District of California.
27 (Ormond Decl., Exh. 4 at 2; Mattern Decl., Exh. B at 19). Federal Rule of Civil
28 Procedure 45(c)(2)(A) provides that a subpoena may command production of documents,
electronically-stored information, or tangible things “at a place within 100 miles of where
the person resides, is employed, or regularly transacts business in person.” Fed. R. Civ. P.
(c)(2)(A). During the meet and confer process regarding the First Subpoena, Movants
offered “to stipulate to the place of compliance and production as Los Angeles,
California.” (Ormond Decl., Exh. 5 at 2).

1 counsel for the Labels and TikTok about the propriety of the redactions. (Motion at 3).
2 On February 28, 2022, after the expiration of the original discovery cut-off but before the
3 Florida Court extended the deadline, Movants sent a “meet and confer” letter to TikTok
4 raising their concerns about its refusal to produce any documents in response to the First
5 Subpoena. (Ormond Decl., Exh. 5). TikTok’s counsel responded to the letter on March 2,
6 2022, and a telephonic conference of counsel took place on March 9, 2022. (*Id.* ¶ 6 &
7 Exh. 6). During the conference, TikTok agreed to consider making a supplemental
8 response to the first and third requests, which respectively sought agreements and licenses
9 between TikTok and the Labels, and the identities of any companies used to monitor the
10 use of the Labels’ sound recordings. (*Id.* ¶ 7 & Exh. 7).

11
12 Also on March 9, 2022, Movants served a second subpoena on TikTok. (“Second
13 Subpoena,” *id.* ¶ 9 & Exh. 8). Unlike the First Subpoena’s limited demands for
14 documents, the Second Subpoena sought both documents and corporate testimony and
15 greatly expanded the scope of the information requested. The requests for production of
16 documents repeated the four requests in the First Subpoena,⁸ and added eleven more.
17 Among other things, the additional requests seek documents addressing the distinctions
18 between commercial and non-commercial users, user confusion related to rights to music
19 in TikTok’s libraries, TikTok’s monitoring of alleged copyright infringement and its
20 removal of infringing posts, and analytics data regarding the @bangenergy and
21 @bangergy.ceo accounts from January 2016 to the present. (Second Subpoena at 8-10).
22 The eighteen deposition topics for TikTok’s corporate witness(es) generally seek

23
24 ⁸ The first four document requests in the First and Second Subpoenas largely mirror each
25 other, though with some small differences. As noted above, the first production request in
26 the Second Subpoena seeks information about TikTok’s communications and agreements
27 only with the eight plaintiffs in the Florida Action, while its counterpart in the First
28 Subpoena sought the same documents from the eight plaintiffs in the Florida Action and
eight other non-party music labels and publishers. The Second Subpoena also enlarges
the period for production of agreements and licenses in the first request from 2018 to the
present (First Subpoena) to 2016 to the present (Second Subpoena), and the period for
production of reports to the Labels in the fourth request from 2018 to the present (First
Subpoena) to 2017 to the present (Second Subpoena). (*Compare* First Subpoena at 5 *with*
Second Subpoena at 8).

1 testimony about the same subjects addressed in the document requests, with the addition
2 of a topic seeking testimony about TikTok's communications with seven non-party
3 companies concerning each non-party's use of music in its TikTok posts. (*Id.* at 5-7).
4

5 Counsel for Movants met and conferred with counsel for TikTok on March 22, 24,
6 and 28, 2022 to discuss the Second Subpoena. (Ormond Decl. ¶ 10). On April 1, 2022,
7 TikTok served written responses and objections to the notice of deposition in the Second
8 Subpoena and, separately, the requests for production of documents. TikTok agreed to
9 produce a witness to testify about certain Topics, with some occasionally significant
10 qualifications, but stated that it would not produce a witness to testify about other Topics.
11 (*See generally id.*, Exh. 9). TikTok similarly agreed to produce documents, again with
12 some occasionally significant qualifications, in response to certain Requests, but stated
13 that it would not produce any documents in response to other Requests. (*Id.*, Exh. 10).
14 This Order will address the substance of the parties' disputes regarding specific deposition
15 topics and production requests in Part IV below.
16

17 III. 18 STANDARD 19

20 Federal Rule of Civil Procedure 26(b)(1), as amended on December 1, 2015,
21 provides:
22

23 Parties may obtain discovery regarding any nonprivileged matter that is
24 relevant to any party's claim or defense and proportional to the needs of the
25 case, considering the importance of the issues at stake in the action, the
26 amount in controversy, the parties' relative access to relevant information,
27 the parties' resources, the importance of the discovery in resolving the
28 issues, and whether the burden or expense of the proposed discovery

1 outweighs its likely benefit. Information within this scope of discovery
2 need not be admissible in evidence to be discoverable.

3
4 Fed. R. Civ. P. 26(b)(1).

5
6 Evidence is relevant if “it has any tendency to make a fact more or less probable
7 than it would be without the evidence, and the fact is of consequence in determining the
8 action.” Fed. R. Evid. 401. “The relevance standard is commonly recognized as one that
9 is necessarily broad in scope in order ‘to encompass any matter that bears on, or that
10 reasonably could lead to other matter that could bear on, any issue that is or may be in the
11 case.’” *Doherty v. Comenity Capital Bank & Comenity Bank*, 2017 WL 1885677, at *2
12 (S.D. Cal. May 9, 2017) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
13 (1978)); *see also Sci. Games Corp. v. AGS LLC*, 2017 WL 3013251, at *2 (D. Nev. July
14 13, 2017) (“Even after the 2015 amendments, courts continue to recognize that discovery
15 relevance remains ‘broad’ in scope.”); *Wagafe v. Trump*, 2018 WL 348470, at *1 (W.D.
16 Wash. Jan. 10, 2018) (“[T]he scope of discovery is broad.”). “Proportionality focuses on
17 the marginal utility of the discovery sought.” *In re Methyl Tertiary Butyl Ether Prod.*
18 *Liab. Litig.*, 180 F. Supp. 3d 273, 280 n.43 (S.D. N.Y. 2016) (internal quotation marks and
19 citation omitted). While the scope of permissible discovery may be broad, because
20 discovery must be both relevant and proportional to the needs of the case, the right to
21 discovery, even plainly relevant discovery, is not limitless.

22
23 A party seeking discovery from a third party may obtain a subpoena for the
24 evidence pursuant to Rule 45. “The scope of discovery through a subpoena under Rule 45
25 is the same as the scope of discovery permitted under Rule 26(b).” *Intermarine, LLC v.*
26 *Spliethoff Bevrachtungskantoor, B.V.*, 123 F. Supp. 3d 1215, 1217 (N.D. Cal. 2015); *see*
27 *also Noble Roman’s, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 307 (S.D. Ind.
28 2016) (“The limits and breadth of discovery under Rule 26 apply to Rule 45 subpoenas to

1 non-parties.”); *Citizens Union of City of New York v. Att’y Gen. of New York*, 269 F. Supp.
2 3d 124, 139 (S.D. N.Y. 2017) (“In general, the relevance standard that applies when
3 seeking discovery from a party also applies to non-parties.”); *MetroPCS v. Thomas*, 327
4 F.R.D. 600, 610 (N.D. Tex. 2018) (“[T]he Court may properly apply the Rule 26(b)(1)
5 proportionality factors in the context of a Rule 45(d)(3)(A) motion to quash or a Rule
6 45(d)(2)(B)(i) motion to compel or, for that matter, in the context of Rule 45(d)(1)’s duty
7 to avoid imposing undue burden or expense on a person subject to the subpoena[.]”).
8 Accordingly, a subpoena request that does not comply with the requirements of Rule
9 26(b) may properly be objected to on that basis. *See Hosseinzadeh v. Bellevue Park*
10 *Homeowners Ass’n*, 2020 WL 3271769, at *2 (W.D. Wash. June 17, 2020) (“If a
11 subpoenaed party believes that a subpoena requires it to produce material that is
12 irrelevant, disproportionate to the needs of the case, or privileged, then the subpoenaed
13 party may move to quash or modify the subpoena.”).

14
15 “In addition to the discovery standards under Rule 26 that are incorporated by Rule
16 45, Rule 45 itself provides that ‘on timely motion, the court for the district where
17 compliance is required must quash or modify a subpoena that . . . subjects a person to
18 undue burden.’” *In re Subpoena of DJO, LLC*, 295 F.R.D. 494, 497 (S.D. Cal. 2014)
19 (quoting Fed. R. Civ. P. 45(d)(3)(A)(iv)). Whether a subpoena imposes an undue burden
20 on a particular witness is a “case specific inquiry.” *Thayer v. Chiczewski*, 257 F.R.D. 466,
21 469 (N.D. Ill. 2009) (internal quotation marks and citations omitted). “[C]oncern for the
22 unwanted burden thrust upon non-parties is a factor entitled to special weight in
23 evaluating the balance of competing needs” in a Rule 45 inquiry. *Cusumano v. Microsoft*
24 *Corp.*, 162 F.3d 708, 717 (1st Cir. 1998)); *see also Dart Industries Co., Inc. v. Westwood*
25 *Chemical Co.*, 649 F.2d 646 (9th Cir. 1980) (“While discovery is a valuable right and
26 should not be unnecessarily restricted, the ‘necessary’ restriction may be broader when a
27 non-party is the target of discovery.”). In determining whether a subpoena poses an undue
28 burden, courts “weigh the burden to the subpoenaed party against the value of the

1 information to the serving party.” *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D.
2 Cal. 2005) (quoting *Travelers Indem. Co. v. Metropolitan Life Insur. Co.*, 228 F.R.D. 111,
3 113 (D. Conn. 2005)). Courts are particularly reluctant to require a non-party to provide
4 discovery that can be produced by a party. Accordingly, “[a] court may prohibit a party
5 from obtaining discovery from a non-party if that same information is available from
6 another party to the litigation.” *Rocky Mountain Medical Management*, 2013 WL
7 6446704, at *4 (D. Idaho Dec. 5, 2013); *see also Precourt v. Fairbank Reconstruction*
8 *Corp.*, 280 F.R.D. 462, 467 (D. S.D. 2011) (“If the party seeking information can easily
9 obtain the same information without burdening the non-party, the court will quash the
10 subpoena.”); *Brown v. City of Syracuse*, 648 F. Supp. 2d 461, 466 (N.D. N.Y. 2009)
11 (when balancing hardships between requesting party and non-party, court should consider
12 whether there are other sources for obtaining the material); *Arthrex, Inc. v. Parcus*
13 *Medical, LLC*, 2011 WL 6415540, at *6 (S.D. Ind. Dec. 21, 2011) (“A party’s ability to
14 obtain documents from a source with which it is litigating is a good reason to forbid it
15 from burdening a non-party with production of those same requests.”). Finally, Rule
16 45(d)(3)(B)(i) also permits the Court to quash or modify a subpoena if compliance would
17 require disclosure of a trade secret or other confidential research, development, or
18 commercial information.⁹

20 IV.

21 DISCUSSION

22
23 In determining whether Movants’ discovery requests seek information that is
24 relevant and proportional to the needs of this case, the Court notes as a preliminary matter
25 that copyright infringement is a strict liability offense. *Buck v. Jewell-Lasalle Realty Co.*,
26 283 U.S. 191, 198 (1931); *Monge v. Maya Magazines Inc.*, 688 F.3d 1164, 1170 (9th Cir.

27 ⁹ The Protective Order issued in the Florida Action applies to third-party confidential
28 information and documents in this proceeding. (Ormond Decl., Exh. 11 at 3, ¶ 4).

1 2012). Under 17 U.S.C.A §504(a), an infringer of copyright will be liable for either
2 (1) the copyright owner’s actual damages and any additional profits of the infringer; or
3 (2) statutory damages. While an infringer’s state of mind is generally not relevant to a
4 finding of liability, whether an infringement was “willful” or “innocent” is a critical factor
5 in assessing the amount of statutory damages. Here, Movants contend that any alleged
6 infringement was innocent.

7
8 Whether a defendant’s infringement is innocent is a factual determination for
9 which the defendant bears the burden of proof. 17 U.S.C. § 504(c)(2); *see also Los*
10 *Angeles News Serv. v. Reuters Television Intern., Ltd.*, 149 F.3d 987, 995 (9th Cir. 1998);
11 *Frank Music Corp. v. MGM, Inc.*, 772 F.2d 505, 515 (9th Cir. 1985). The evidence must
12 establish that the infringer has a “good faith belief in the innocence of [its] conduct” and
13 that such a belief was reasonable. *See Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d
14 1332, 1336 (9th Cir. 1990) (willfulness not present where defendant believed it was acting
15 under color of right granted by a license); *see also Frank Music Corp.*, 772 F.2d at 515
16 (defendant’s reasonable belief that it had a valid license to use plaintiffs’ works
17 sufficiently established that infringement was not willful); *Danjaq LLC v. Sony Corp.*, 263
18 F.3d 942, 959 (9th Cir. 2001) (production of works under a reasonable belief that the
19 infringer possessed a license or implied license was not willful infringement); *Bagdadi v.*
20 *Nazar*, 84 F.3d 1194, 1201 (9th Cir. 1996) (reasonable reliance on an “unambiguous” but
21 inaccurate copyright notice was not willful infringement).

1 **A. Deposition Topics**

2
3 **1. TikTok’s Policies, Procedures And Notifications Concerning The**
4 **Use Of Music From Its Libraries On The TikTok Platform**
5 **(Topic Nos. 1-4 and 7-8)**

6
7 Topic 1: The policies and practices of TikTok Inc. (and its predecessor
8 music.ly) (collectively referenced herein as “TikTok”) and TikTok’s
9 representatives, employees, agents, and contractors regarding TikTok’s
 users, including the use of music on TikTok’s platform between 2014 and
 present.¹⁰

10 TikTok has agreed to designate a witness to discuss its policies regarding
11 limitations on the commercial use of music by a user since 2016, which it contends will
12 address the only matter relevant to Movants’ defense -- that they had a license because the
13 delineation between commercial and non-commercial users allegedly did not exist at the
14 time the purportedly infringing videos were posted.¹¹ (Jt. Stip. at 8). According to
15 TikTok, Movants have not identified any other user-related policies and practices relevant
16 to the Florida Action, and as such, the Topic is overly broad and disproportionate to the
17 needs of this case. (*Id.* at 9-10). Furthermore, TikTok contends that Movants’ apparent
18 belief that TikTok’s Terms of Service “changed” in 2020 is “demonstrably false.” (*Id.* at
19 9). Movants claim that testimony about commercial use limitations is not sufficient, as
20 they are seeking testimony about policies and changes on the use of music from the
21 TikTok libraries for both commercial and non-commercial purposes. (*Id.* at 8). Movants
22 argue that the distinction between commercial and non-commercial users did not exist
23 prior to the creation of TikTok’s commercial music library in 2020. (*Id.*).

24
25 _____
26 ¹⁰ During the meet and confer discussions, Movants “clarified” that Topic 1 seeks
27 “testimony specifically relating to TikTok’s policies and practices on the use of music
 from TikTok’s music libraries, as those policies and practices evolved from 2016
 . . . to the present.” (Jt. Stip. at 7).

28 ¹¹ At the hearing, counsel for Movant clarified that the time frame that the infringing
 videos were posted on TikTok was 2019 to 2020.

DECISION

TikTok has agreed to produce a witness who will testify about policies regarding limitations on the commercial use of music by a user since 2016. The Court finds that any information sought beyond this is not relevant. For this reason, the motion to compel as to Topic 1 is DENIED to the extent that it seeks information exceeding the scope of TikTok’s agreed-upon designation.

Topic 2: The history of distinguishing commercial users of the TikTok platform from other users.

Topic 3: The criteria TikTok used to designate a user as a commercial user.

Topic 4: This history of creating a commercial music library that is distinguishable from a noncommercial music library, including the background of this change, when this change occurred, TikTok’s reasons for making this change, any steps TikTok took to make this change known to all users, and any steps TikTok took to enforce this change in policy.

TikTok has agreed to designate a witness to discuss the creation of its commercial music library and its policies regarding the commercial use of music. According to TikTok, whether Movants had a license to use music from its music libraries is the only issue relevant to the Florida Action. (Jt. Stip. at 11, 13). TikTok states that it is not clear what more Movants want beyond TikTok’s agreed designation. (*Id.* at 15). Furthermore, TikTok explains that it, as a service provider, does not categorize users as “commercial” and “non-commercial.” (*Id.* at 11, 13). Movants claim that they require testimony about “the history of the distinctions between commercial and other music libraries and users,” not just the creation of the commercial music library. (*Id.* at 11-12). Specifically with respect to Topic No. 4, Movants state that, in addition to testimony about TikTok’s creation of a commercial library and its commercial use policies, they are seeking information about TikTok’s communications to its users to notify them of the distinctions between the commercial and other music libraries. (*Id.* at 14).

DECISION

The Court finds that Movants have not made an adequate showing as to why they are entitled to the testimony sought in Topics 2-4. For this reason, the motion to compel as to Topics 2-4 is DENIED to the extent that it seeks information exceeding the scope of TikTok's agreed-upon designation.

Topic 7: TikTok's policies, practices, knowledge, and notification to a commercial user's use of the TikTok's non-commercial music library.

Topic 8: TikTok's involvement and communications with users, including Defendants and Defendants' representatives, regarding posts on TikTok related to Bang Energy, including but not limited to the post attached hereto as Exhibit 1, Bates No. VPX-UMG-000090 and VPX-UMG-000094.

TikTok has agreed to designate a witness to discuss the creation of its commercial music library and its policies regarding the commercial use of music, specifically "including whether a commercial user may use TikTok's non-commercial music library." (*Id.* at 16). TikTok notes that it does not control whether a user elects to have a TikTok for Business account, or the content of any of its users' posts. (*Id.*). TikTok further claims that to the extent that Movants are seeking information about notifications to other users, the Topic is not relevant or proportional to the needs of the case. (*Id.* at 16-17). Movants argue that TikTok's agreed designation is not sufficient because Movants also seek information about TikTok's "knowledge of and communications to users in cases of commercial users' use of the non-commercial library." (*Id.* at 16).

DECISION

The Court finds that Movants have not demonstrated the need for testimony as to Topic 7 beyond what TikTok has agreed to provide. For this reason, the motion to compel as to Topic 7 is DENIED to the extent that it seeks information exceeding the scope of TikTok's agreed-upon designation. Topic 8 seeks in part information about posts by users

1 other than Bang Energy related to Bang. These users, sometimes called “influencers,”
2 posted videos related to Bang in order to promote Bang’s products. At the hearing,
3 Movants’ counsel stated that these influencers are “commissioned” by Bang to promote
4 Bang’s products. However, it should not be TikTok’s burden to search for these
5 influencers and their posts, which are, or should be, known to Bang. For this reason, the
6 motion to compel as to Topic 8 is GRANTED IN PART. TikTok is ORDERED to
7 present a witness to testify about TikTok’s involvement or communications with Movants
8 regarding Bang Energy’s video posts alleged to have infringed the Labels’ copyright.

9
10 **2. TikTok’s Communications To Users Regarding Permissible And**
11 **Impermissible Use Of Music On TikTok And Similar Confusion**
12 **On Permitted Uses (Deposition Topics 5-6 and 9-13)**

13
14 Topic No. 5: TikTok’s communications to users, including Defendants
15 Vital Pharmaceuticals, Inc. d/b/a Bang Energy, and Jack Owoc
16 (“Defendants”) and Defendants’ representatives, regarding the use of music
in videos created or posted on the TikTok platform, including any copyright
policies, disclaimers, and/or restrictions on such use.¹²

17 TikTok agreed to designate a witness to discuss its copyright policies, disclaimers,
18 and/or restrictions on the use of music on TikTok. (Jt. Stip. at 19). Because that agreed
19 designation largely tracks the language of the Topic, TikTok contends that to the extent
20 Movants seek to compel more, the motion should be denied. (*Id.* at 19-20). Movants state
21 that TikTok’s reduction of the Topic to a “narrow issue” is insufficient because it does not
22 expressly include communications to Bang Energy about its specific use of music in
23 TikTok posts. (*Id.* at 19).

24
25
26
27
28 ¹² During the meet and confer discussions, Movants offered to limit Topic 5 to
communications with Bang Energy and/or its representatives. (Jt. Stip. at 19).

1 **DECISION**

2
3 The Court finds that Movants have demonstrated the need for and relevance of the
4 testimony sought in Topic 5 to the extent it concerns communications between TikTok
5 and Movants and/or Movants' representatives. For this reason, the motion to compel as to
6 Topic 5 is GRANTED IN PART. However, the scope of the Topic shall be limited only
7 to communications between TikTok and Movants and/or Movants' representatives.

8
9 Topic 6: TikTok's communications to users regarding the user's suspected
unauthorized use of music.¹³

10 Topic 9: TikTok's knowledge of any confusion expressed by TikTok users
11 related to a user's rights to use music in TikTok's music libraries on posts
12 for the TikTok platform.

13 TikTok has not agreed to designate a witness for Topics 6 and 9, even as rewritten
14 by Movants to limit the testimony respectively to communications about "unauthorized
15 uses of music from TikTok's musical libraries and general communications about such
16 unauthorized uses" or "any confusion expressed to TikTok" to or by users that are
17 "similarly situated" to Bang Energy. (Jt. Stip. at 22, 25). According to TikTok, its
18 communications to other users, or other users' understanding of TikTok's Terms of
19 Service, have no bearing on whether Movants had a license or what Movants understood.
20 (*Id.* at 23, 26). Furthermore, TikTok's "robust" notice-and-takedown policy to address
21 user infringements in compliance with the Digital Millennium Copyright Act ("DMCA")
22 is described in TikTok's intellectual property policy. (*Id.* at 23-24, 26). TikTok maintains
23 that the Topic as written is over broad and seeks irrelevant information, and argues that a
24 nonparty should not have to "do the work of tailoring a subpoena" to what the requesting
25 party needs. (*Id.* at 24, 27) (quoting *Virginia Dept. Of Corrections v. Jordan*, 921 F.3d
26

27 ¹³ During the meet and confer discussions, Movants offered to limit Topic 6 to
28 "unauthorized uses of music from TikTok's musical libraries and general communications
about such unauthorized uses, not as to any specific users." (Jt. Stip. at 21).

1 180, 190 (4th Cir. 2019)). Movants contend that the information they seek “bears on
2 [TikTok’s] complex and unclear usage policies and mechanics” and whether and how
3 TikTok informed users of violations of music library uses. (*Id.* at 21-22, 24-25). Movants
4 maintain that the “existence of a license creates an affirmative defense to a claim of
5 copyright infringement.” *quoting Oracle USA, Inc. v. Rimini St., Inc.*, 879 F.3d 848, 954
6 (9th Cir. 2018). They also note that an implied license is also an affirmative defense and
7 that the materials sought in the topic bears on the issue of “innocent infringement.” *See*
8 17 U.S.C. § 504 (c)(2). (*Id.* at 20-21). Movants believe that this information will support
9 their contention that Bang Energy reasonably believed it was not violating TikTok’s
10 policies or the Labels’ copyrights. (*Id.* at 22, 25).

11 12 **DECISION**

13
14 The Court finds that Topic 6, as written, is overly broad and is not relevant to any
15 claim or defense. For these reasons, the motion to compel as to Topic 6 is DENIED. As
16 for Topic 9, which seeks testimony about “any confusion” expressed by TikTok users
17 related to a user’s rights to use music found in TikTok’s music library for posts, the Court
18 finds this topic does not relate to the claims and defenses in the Florida Action. The Court
19 is not persuaded that confusion experienced by other users has any bearing on whether
20 Bang Energy’s alleged infringement was willful or innocent. Further, the term “any
21 confusion” is vague and unclear. For these reasons, the motion to compel as to Topic 9 is
22 likewise DENIED.

23
24 Topic 10: TikTok’s knowledge of the number of accounts that have been
25 suspended or terminated on the TikTok platform as a result of actual or
26 alleged copyright violations from 2016 through the present.¹⁴

27 ¹⁴ During the meet and confer discussions, Movants “clarified” that Topics 10 and 11 seek
28 “only information related to the number of suspended or terminated accounts due to music
copyright violations based on music from TikTok’s music libraries, not for any user-
supplied music.” (Jt. Stip. at 27, 30).

1 infringe or potentially infringe another’s copyrighted work.¹⁵

2 Topic 13: TikTok’s process for monitoring and enforcement of its policies
3 and procedures regarding the use of music of the TikTok platform.

4 TikTok has agreed to designate a witness to discuss its Intellectual Property Policy,
5 which includes the process for submitting a copyright infringement report and requesting
6 its removal. (Jt. Stip. at 32-33). TikTok notes that Movants appear to misunderstand
7 what TikTok is -- a content host that stores content at the direction of its users and is
8 immunized by Congress from liability, provided it complies with the DMCA by
9 implementing a robust notice-and-takedown policy. (*Id.* at 33, 35). Movants state that
10 they are seeking information not only about TikTok’s notice-and-takedown policy, but
11 about TikTok’s “own affirmative identification and removal of posts that infringe or
12 potentially infringe another’s copyrighted work, . . . irrespective of reports or takedown
13 requests from others.” (*Id.* at 32, 34).

14 15 **DECISION**

16
17 The Court finds that information regarding TikTok’s process for identifying and
18 removing posts that infringe or potentially infringe another’s copyrighted work related to
19 the use of music from TikTok’s libraries is relevant to this lawsuit. For this reason, the
20 motion to compel as to Topic 12 is GRANTED, as limited to information about
21 infringement of copyrights related to the use of music from TikTok’s musical libraries.
22 As to Topic 13, TikTok asserts that in determining whether a user has posted infringing
23 content, it relies on the copyright holder to notify TikTok of an infringing use of material,
24 and TikTok in turn removes the material and provides the user of notice and an
25 opportunity to respond. TikTok states that in line with its DMCA policy, repeat infringers
26 are terminated from the platform. Because the Court finds that the information sought in

27
28 ¹⁵ During the meet and confer discussions, Movants “clarified” that Topics 12 and 13 seek information “about infringement of copyrights related to the use of music from TikTok’s musical libraries.” (Jt. Stip. at 32, 34).

1 Topic 13 is relevant and proportional to the needs of the case, the motion to compel as to
2 Topic 13 is likewise GRANTED.

3
4 **3. Analytics Data (Topic No. 14)**

5 Topic 14: TikTok’s monthly analytics data, including the number of
6 followers, profile and video views, engagements, likes, comments, and
7 shares, for the @bangenergy and @bangenergy.ceo accounts from January
8 2017 to the present.

9 TikTok states that after investigating the issue, it determined that its systems “only
10 store a user’s accounts monthly data for the previous 90 days.” (Jt. Stip. at 36). Because
11 it does not have the data to respond to this topic, TikTok contends that the request for
12 Topic 14 should be denied as moot.¹⁶ (*Id.*). Movants state that TikTok had previously
13 told them that data on its dashboard was available for only the past 60 days, and that
14 “TikTok never conveyed to Bang any 90-day limitation, or what specific search and
15 retrieval process was executed.” (*Id.*). Despite TikTok’s representation about the limited
16 retention of analytic data, Movants assert that “[i]f the data is available for the full
17 requested time period of January 2017 to the present, following a reasonable search and
18 retrieval, it should be produced.” (*Id.*). At the hearing on the Motion, Movants
19 maintained that data which predated the posting of the alleged infringing videos should be
20 disclosed as it would demonstrate any historical trends related to before the time the
21 videos were posted and after.

22
23 **DECISION**

24
25 The Court finds that data related to Movants’ own accounts is relevant and should
26

27 ¹⁶ At the hearing on this Motion, TikTok stated that it can obtain “aggregate data,” which
28 is a summary of data related to a user’s account up to the current date. However, this data
will not be broken down month by month, which TikTok indicated is only maintained for
the previous 90-day period.

1 be disclosed to the extent that it exists. Furthermore, at the hearing, TikTok conceded that
2 some aggregate data is available. For this reason, the motion to compel as to Topic 14 is
3 GRANTED IN PART. TikTok shall produce a witness to testify about aggregate data
4 from January 1, 2019, to the present related to Movants' accounts.

5
6 **4. TikTok's Agreements With The Labels, And Enforcement And**
7 **Implementation Of Same (Topics 16 and 17)**

8
9 Topic 16: TikTok's contracts, agreements, licenses, and amendments with
10 the following entities (collectively "Labels") that relate to the use of sound
11 recordings owned or controlled by the Labels on TikTok or available in
12 TikTok's music library between 2016 and present:

- 11 A. UMG Recordings, Inc.
12 B. Universal Music Corp.
13 C. Universal Music - Z Tunes LLC
14 D. Universal Musica, Inc.
15 E. PolyGram Publishing, Inc.
16 F. Songs of Universal, Inc.
17 G. Universal Music - MGB NA LLC
18 H. Capitol Records, LLC

16 TikTok agreed to designate a witness to testify about the terms in its agreements
17 with UMG Recordings and UMG-affiliated entities regarding the commercial and non-
18 commercial use of music, which it maintains is all that is relevant to the claims and
19 defenses in the Florida Action. (Jt. Stip. at 38). To the extent that Movants seek more,
20 TikTok argues that the information is either not relevant, disproportionate to the needs of
21 the case, or can be more properly obtained from a party to the Florida Action. (*Id.* at 38-
22 40). TikTok notes that the two cases cited by Movants for the proposition that objections
23 based on the equal availability of documents are insufficient to resist a discovery request
24 -- *Zuniga v. W. Apartments*, 2014 WL 2599919, at *3 (C.D. Cal. Mar. 25, 2014), and *In re*
25 *Citimortgage, Inc., Home Affordable Modification Program ("HAMP") Litigation*, 2012
26 WL 10450139, *3 (C.D. Cal. June 7, 2012), are inapposite because they concern
27 production by a party to the litigation, not a third party. (Jt. Stip. at 39-40). Movants
28 contend that TikTok has not agreed to provide a witness to testify about the financial

1 compensation terms of the agreements or the scope of any releases or authorizations, “all
2 of which bear on any potential liability or damages claims” asserted against Movants by
3 the Labels. (*Id.* at 38). Furthermore, citing *Zuniga* and *HAMP*, Movants assert that the
4 availability of the requested information from other parties does not discharge TikTok
5 from its obligation to comply with the subpoena, particularly as TikTok has “not made
6 any showing of any undue burden it would incur in producing responsive documents and
7 information.” (*Id.*).

8 9 DECISION

10
11 TikTok has agreed to designate a witness to testify about the terms in its
12 agreements with the Labels regarding the commercial and non-commercial use of music,
13 which the Court finds to be the relevant information to which Movants are entitled. For
14 this reason, the motion to compel as to Topic 16 is DENIED to the extent that it seeks
15 information exceeding the scope of TikTok’s agreed-upon designation.¹⁷

16
17 Topic 17: Any and all guidelines, directions, and communications received
18 by TikTok from the Labels concerning the use of the Labels sound
recordings on TikTok.

19 TikTok has agreed to produce a witness to discuss “any guidelines or directions
20 from the Labels that relate to whether TikTok’s agreement with the Labels includes
21 ‘commercial’ use by a user.” (Jt. Stip. at 41). TikTok argues that if Movants seek more,
22 the information is irrelevant or more properly obtained from a party to the Florida Action.
23 (*Id.* at 41-42). Movants argue that TikTok’s proposal is too narrow, as the subpoena seeks
24 “all of the permitted and prohibited uses under the agreements with the Labels and how
25 they were implemented, enforced, and interpreted in practice.” (*Id.* at 41). Movants
26

27 ¹⁷ The Court notes that RFP 1, which is a document production request which mirrors
28 Topic 16, was also propounded on the Labels directly in the Florida Action. However, the
Magistrate Judge in Florida denied the motion to compel RFP 1 as untimely. *See*
“Omnibus Order,” Florida Action, Dkt. No. 116 at 8-9.

1 further cite *Zuniga* and *HAMP* for the proposition that the availability of the requested
2 information from other parties does not discharge TikTok from its obligation to comply
3 with the subpoena. (*Id.*)

4 5 **DECISION**

6
7 The Court finds that Topic 17 is overly broad and not tailored to the issues in this
8 case. For these reasons, the motion to compel as to Topic 17 is DENIED.

9 10 **5. TikTok’s Communications With Other Brands Regarding The** 11 **Use Of Music On TikTok Posts (Topic 18)**

12
13 Topic 18: Any and all communications with the following companies
concerning the use of music in their respective posts appearing on TikTok:

- 14 A. Celsius Energy
15 B. Alani Nu
16 C. C4 Energy
17 D. Sway Energy
E. Fashion Nova
F. G Fuel
18 G. Ghost Nutrition

19 TikTok has not agreed to designate a witness for Topic 18 because “information
20 about communications between nonparty TikTok and *other* nonparties has no conceivable
21 relevance to a claim or defense in this case, to say nothing of proportionality.” (Jt. Stip. at
22 44). According to TikTok, those communications shed no light on whether Movants
23 believed that they had a license or implied license, or that their infringement was innocent.
24 (*Id.*). Additionally, TikTok maintains that the request is overbroad and not proportional to
25 the needs of the case. (*Id.* at 45). Finally, TikTok argues that the Stored Communications
26 Act (“SCA”), 18 U.S.C. §§ 2702(c), 2703(c)(1), bars it from disclosing the “contents of
27 communications” of other users. (*Id.*) (citing *In re Zynga Privacy Litig.*, 750 F.3d 1098,
28 1106 (9th Cir. 2014)). Movants argue that TikTok’s communications with other brands

1 with commercial uses and accounts on TikTok bear on TikTok’s “complex and unclear
2 usage policies and mechanics” and on Movants’ reasonable belief that they were not
3 violating TikTok’s policies or others’ copyrights. (*Id.* at 43). Furthermore, Movants
4 assert that none of the information they request is barred by the SCA because TikTok is
5 not an email service or storage repository, and the information is not stored on TikTok’s
6 social media platform. (*Id.*).

8 DECISION

9
10 The Court finds that Topic 18, as written, is overly broad and not proportional to
11 the needs of the case. The information sought may also be barred from disclosure by the
12 Stored Communications Act. For these reasons, the motion to compel as to Topic 18 is
13 DENIED.

14 15 **B. Production Requests**

16 17 **1. Agreements Between TikTok And The Labels And** 18 **Communications Regarding Same, And Monitoring Of Use Of** 19 **Labels’ Music (Request Nos. 1-4)**

20
21 RFP No. 1: Any and all contracts, agreements, licenses, amendments,
22 between TikTok Inc. (and its predecessor music.ly) (collectively referenced
23 herein as “TikTok”) and the following entities (collectively “Labels”) that
relate to the use of sound recordings owned or controlled by the Labels on
TikTok or available in TikTok’s music library between 2016 and present:

- 24 A. UMG Recordings, Inc.
- 25 B. Universal Music Corp.
- 26 C. Universal Music – Z Tunes LLC
- 27 D. Universal Musica, Inc.
- 28 E. PolyGram Publishing, Inc.
- F. Songs of Universal, Inc.
- G. Universal Music - MGB NA LLC
- H. Capitol Records, LLC

1 TikTok states that it agreed to produce, and has produced, “its effective license
2 agreements with Universal Music that would have applied to the period at issue in the suit,
3 which contain the scope of rights language”¹⁸ (Jt. Stip. at 49). However, TikTok
4 further contends that the scope of rights language in the agreements establishes that *its*
5 agreements with the Labels are not relevant to the Florida Action. TikTok’s Terms of
6 Service expressly state that “no rights are licensed with respect to sound recordings” in its
7 musical libraries, (*id.* at 48), and the Labels’ theory of liability is that Movants exceeded
8 TikTok’s Terms of Service by using music for commercial purposes without a license. (*Id.*
9 at 49). Finally, TikTok argues that the discovery sought by RFP No. 1 is available from
10 the parties to the Florida Action, and it is less burdensome and more efficient to require
11 parties to the litigation to produce documents in their possession. (*Id.* at 49-50). Movants
12 note that TikTok’s written response to RFP No. 1 indicates that it will produce only the
13 agreement “in effect when the complaint was filed,” and it has refused to produce term
14 extensions to the agreement. (*Id.* at 47). Although Movants acknowledge that the Labels
15 have produced a copy of a music licensing agreement with TikTok, the copy was “heavily
16 redacted” with respect to financial compensation terms and the scope of new releases and
17 authorizations. (*Id.*). Movants further observe that they have filed a pending motion to
18 compel against the Labels in the Florida Action to require production of unredacted
19 license agreements and communications with TikTok regarding the same. (*Id.* at 48).
20 Finally, Movants once again cite *Zuniga* and *HAMP* for the proposition that the
21 availability of discovery from another party does not discharge the obligation of a
22 responding party to comply with a subpoena. (*Id.*).

23
24 At the hearing, counsel for Bang Energy clarified that it received a 2016 licensing
25 agreement between the Labels and music.ly, TikTok’s predecessor, which had been
26 heavily redacted. Further, counsel added that there were more than 10 amendments and
27

28 ¹⁸ TikTok notes that the Florida Action concerns alleged infringements that occurred prior to April 2021. (Jt. Stip. at 49).

1 modifications to that agreement, only some of which had been produced, and then only in
2 part, and that Movants have not to date received a full set of even that agreement and its
3 amendments. Second, there was a settlement agreement between the Labels and Tiktok
4 which was produced in a heavily redacted form. Finally, there was an “alliance
5 agreement” which was not produced. TikTok responded that many of the redactions in
6 the licensing and settlement agreements had to do with financial information regarding
7 how much TikTok pays the Labels, which is highly sensitive information which should
8 not be disclosed. Movants stated that they propounded RFP No. 1 against the Labels in
9 the Florida Action, seeking the same information from the Labels that they seek here from
10 TikTok, and moved to compel a complete response to RFP No. 1 in the Florida court.
11 That motion was denied by the Magistrate Judge in the Florida Action as untimely.

12 13 **DECISION**

14
15 Movants are not entitled to receive any documents beyond those that TikTok has
16 provided, or agreed to provide. For this reason, the motion to compel as to RFP No. 1 is
17 DENIED to the extent that it seeks documents exceeding the scope of TikTok’s agreed-
18 upon production.

19
20 RFP No. 2: Any and all guidelines, directions, and communications
21 received by TikTok from the Labels concerning the use of the Labels sound
recordings on TikTok.

22 In its written response to RFP No. 2, TikTok agreed to produce “any guidelines or
23 directions from the Labels that relate to whether TikTok’s agreement with the Labels
24 includes ‘commercial’ use by a user, to the extent such documents exist and can be located
25 in a reasonably diligent search.” (Jt. Stip. at 51). According to TikTok, Movants have not
26 explained why anything more is relevant to Movants’ case. (*Id.* at 53). TikTok also
27 argues that the requested communications are not relevant and, alternatively, are available
28 from the Labels themselves. (*Id.* at 52). Movants contend that they are seeking not only

1 guidelines and directions about whether the agreements include commercial use by a user,
2 but also “communications about the permitted and prohibited uses under the agreements
3 with the Labels and how they were implemented, enforced, and interpreted in practice,
4 including any programmatic controls on the app and communications to users regarding
5 the same.” (*Id.* at 52). Movants further argue that the Labels’ production of an agreement
6 with TikTok was heavily redacted, rendering it unusable. (*Id.*).

8 DECISION

9
10 TikTok has agreed to produce any guidelines or directions from the Labels that
11 relate to whether TikTok’s agreements with the Labels include commercial use by a user,
12 which the Court finds to be the relevant inquiry. Any further production is not warranted.
13 For this reason, the motion to compel as to RFP No. 2 is DENIED to the extent that it
14 seeks documents exceeding the scope of TikTok’s agreed-upon production.

15
16 RFP No. 3: The name(s) of any company TikTok retained or was directed
17 to utilize for the purpose of monitoring the use of the Labels’ sound
recordings.

18 In lieu of producing documents responsive to this request, TikTok simply identified
19 ACRCLOUD in its written response as the company it used to assist in audio fingerprinting
20 (matching user-generated content with sound recordings in TikTok’s database) at the time
21 of the filing of the complaint. (Jt. Stip. at 54). Nonetheless, TikTok maintains that
22 whatever company it used for audio fingerprinting has no relevance to whether Movants
23 knew or had reason to know that their posts were allegedly infringing on the Label’s
24 copyrights. (*Id.*). Additionally, TikTok notes that audio fingerprinting companies do not
25 monitor compliance with TikTok’s agreements or provide notices to users of any alleged
26 use violations or potential infringement. (*Id.*). Movants contend that TikTok’s limitation
27 of its response to the company it used “at the time of the filing of the complaint” is
28 insufficient because the relevant period dates back to 2016. (*Id.*). Movants further

1 contend, despite TikTok’s representation to the contrary, that the requested information
2 “bears directly on any notices provided to users of any alleged use violations or even
3 infringement.” (*Id.*).

4
5 **DECISION**

6
7 The Court finds that RFP No. 3 is not relevant to any claims or defenses in this
8 case. For this reason, the motion to compel as to RFP No. 3 is DENIED.

9
10 RFP No. 4: Any and all reports TikTok provided to the Labels regarding
the use of the Labels’ sound recordings between 2017 and present.¹⁹

11
12 TikTok “agreed to search for internal data related to the sound recordings in the
13 ‘post URLs’ that are at issue in this suit,” as it contends that is “the only data that has any
14 conceivable relevance to this case.” (Jt. Stip. at 56). According to TikTok, Movants have
15 not articulated any reason why it needs more information, or even what that information
16 might be. (*Id.*). TikTok also argues that even if Movants had identified such information,
17 it is available from the Labels. (*Id.*). Movants contend that TikTok’s limitation to provide
18 “internal data” is not sufficient because they seek reports on the use of the songs at issue,
19 including who used the songs, how often, whether such uses were consistent with
20 TikTok’s stated policies and agreements with the Labels, and whether any enforcement or
21 other corrective action was taken because of the reported uses. (*Id.* at 55-56).

22
23 **DECISION**

24
25 To the extent that this information has any possible relevance to the claims and
26 defenses in this action, the information can be, or should be, sought from the Labels

27
28

¹⁹ During the meet and confer discussions, Movants agreed to limit this request “to the
songs at issue in the Underlying Action, as reflected in exhibits provided to TikTok.” (Jt.
Stip. at 55).

1 directly, as they are parties to the Florida Action. However, the Court finds that the
2 information requested by RFP No. 4 is not relevant to this litigation. For these reasons,
3 the motion to compel as to RFP No. 4 is DENIED.

4
5 **2. TikTok’s Copyright And Music Use Policies And Procedures,**
6 **Enforcement, And Notifications To Users As To Same (Request**
7 **Nos. 5-8)**

8
9 RFP No. 5: Documents related to TikTok’s policy regarding limitations on
10 commercial or business users (“Commercial Users”) of the TikTok
11 platform to a different library of music than non-commercial or non-
12 business users (“Non-Commercial Users”), including the purpose of this
distinction in users, TikTok’s reasons for making this distinction, any steps
TikTok took to make this distinction known to Commercial and/or Non-
Commercial Users, and any steps TikTok took to enforce this change in
policy.

13 RFP No. 6: TikTok’s communications with Commercial Users and/or Non-
14 Commercial Users informing the users which music library they were
15 permitted to use and informing or instructing them on which music library
they were permitted to use.

16 RFP No. 7: TikTok’s communications with Commercial Users and/or
17 Non-Commercial Users, including Defendants Vital Pharmaceuticals, Inc.
18 d/b/a Bang Energy, and Jack Owoc (“Defendants”) and Defendants’
representatives, regarding the use of music in videos created or posted on
the TikTok platform, including any copyright policies, disclaimers, and/or
restrictions on such use.

19 RFP No. 8: TikTok’s terms, conditions, policies, guidelines, and other
20 communications relating to Commercial Users’ use of TikTok’s
21 commercial and non-commercial music libraries on the TikTok platform
beginning in 2016 to present.

22 TikTok has agreed to produce its Terms of Service for its commercial library of
23 music and states that it “in fact already collected and produced other documents that
24 provide its policies for its commercial library of music.” (Jt. Stip. at 58, 61, 64, 66).²⁰
25 TikTok explains that its “agreement to provide its Terms of Service, Intellectual Property
26 Policy, Community Guidelines, and terms for its commercial music library” should

27
28 ²⁰ TikTok notes that Movants copy the same arguments verbatim in connection with RFP
Nos. 5-8. Accordingly, TikTok incorporates its contentions concerning RFP No. 5 in
response to RFP Nos. 6-8.

1 resolve Movants’ contention that they “relied on TikTok’s representations and practices,”
2 (*id.* at 59), and asserts that Movants have “failed to provide any meaningful reason why
3 something beyond what TikTok agreed to produce is relevant or proportional to the needs
4 of the case.” (*Id.* at 60). According to TikTok, Movants’ belief that its “commercial use
5 parameters changed” is misguided, as its last update to the Terms of Service was in 2019,
6 a year before the creation of the commercial music library. (*Id.* at 59). As such, Movants
7 were “never authorized by TikTok to use its general music library for commercial
8 purposes.” (*Id.*). Movants contend that RFP No. 5 seeks documents “regarding
9 distinctions between commercial and other users and uses on the TikTok platform, and
10 whether and how TikTok differentiated between the two, the history of such
11 differentiation, and how it was enforced, implemented, and communicated to TikTok
12 users over time.” (*Id.* at 57-58, 60-61, 63, 65). Movants state that TikTok’s agreement to
13 provide its current policies is insufficient as it excludes the historical policy changes, and
14 information about how those changes were communicated to users. (*Id.* at 58, 61, 63, 66).

15 16 **DECISION**

17
18 At the hearing on the Motion, TikTok stated that it has already produced the
19 documents requested in RFP Nos. 5-8, including the Terms of Service, community
20 guidelines, and policies regarding its commercial music library. However, the Court finds
21 that some of the information sought in these RFPs is relevant, and to the extent that it
22 exists, should be produced. For this reason, the motion to compel as to RFP Nos. 5-8 is
23 GRANTED IN PART and DENIED IN PART. Specifically, the motion to compel as to
24 RFP Nos. 5-6 is DENIED. The motion to compel as to RFP No. 7 is GRANTED IN
25 PART, as limited to any communications between TikTok and Movants, but not any other
26 users. Finally, the motion to compel as to RFP No. 8 is GRANTED IN PART. TikTok is
27 ORDERED to produce its Terms of Service, including updates, as sought in the request.
28

1 **3. TikTok’s Communications And Involvement As To**
2 **TikTok Posts For The Bang Energy Brand (Request No.**
3 **9)**

4
5 RFP No. 9: Documents reflecting TikTok’s involvement and
6 communications with Commercial Users and Non-Commercial Users,
7 including Defendants and Defendants’ representatives, regarding posts on
8 TikTok related to Bang Energy, including but not limited to the post
9 attached hereto as Exhibit 1, Bates No. VPX-UMG-000090 and VPX-
10 UMG- 000094.

11 TikTok has agreed to produce communications that relate to the making of
12 Movants’ posts to the extent that such communications exist and can be found after a
13 reasonable search. (Jt. Stip. at 68). Movants state that this is too narrow, as the request
14 seeks communications regarding posts related to the Bang Energy brand, which includes
15 posts by other users on other user accounts, particularly “influencers” who “posted videos
16 that related to Bang.” (*Id.* at 67). TikTok responds that Movants have never before
17 mentioned “influencers” and still do not identify who they are. (*Id.* at 68). Furthermore,
18 TikTok states that it “would have no way of knowing what ‘influencers,’ if any, Bang
19 Energy used to make posts or whether those posts related to Bang Energy.” (*Id.*).

20 **DECISION**

21 RFP No. 9 seeks documents related to TikTok’s involvement and communications
22 with Bang Energy and Bang Energy’s “influencers.” For the reasons previously stated,
23 the Court finds that it is not TikTok’s burden to search for Bang’s “influencers” and their
24 posts, which are, or should be, known to Bang. Therefore, the Court will not order
25 production of documents related to influencers. For this reason, the motion to compel as
26 to Topic 8 is GRANTED IN PART. TikTok is ORDERED to produce documents, to the
27 extent they exist, related to TikTok’s involvement or communications with Movants
28 regarding Bang Energy’s video posts alleged to have infringed the Labels’ copyright.

1 **4. TikTok’s Communications to Users Regarding**
2 **Permissible And Impermissible Use Of Music On TikTok**
3 **and Similar Confusion On Permitted Uses (Request Nos.**
4 **10-14)**

5 RFP No. 10: Documents reflecting any confusion expressed to TikTok by
6 TikTok users, including related to users’ rights to use any music in
7 TikTok’s musical libraries on the TikTok platform.

8 TikTok has not agreed to produce documents responsive to RFP No. 10. (Jt. Stip.
9 at 69). According to TikTok, Movants have never articulated “any reason why copyright
10 infringement by other users -- or other users’ understanding of TikTok’s terms of service
11 -- could have any bearing on its defenses.” (*Id.* at 70). TikTok maintains that other users’
12 understanding or “confusion” does not have any relevance to what Movants understood,
13 and Movants are already in possession of whatever representations they contend TikTok
14 made to them. (*Id.*). Furthermore, TikTok asserts that the requests are overbroad. (*Id.* at
15 71). Movants argue that they are seeking documents and information about other
16 “similarly situated” TikTok users, including other brands with commercial accounts with
17 TikTok, with a bearing on the “complex and unclear usage policies and mechanics” that
18 permitted Movants to create posts using music supplied on TikTok’s platform. (*Id.* at 69).
19 Because Movants did not receive any notice from TikTok that their posts violated any
20 policies and their posts were not taken down, Movants believe that they are entitled to
21 know if other users made similar use of songs from TikTok’s library and whether their
22 posts were taken down. (*Id.*). According to Movants, this information “bears directly” on
23 Movants’ reasonable belief that they were not violating TikTok’s policies or others’
24 copyrights. (*Id.* at 69-70).

25
26 **DECISION**

27
28 The Court finds that RFP No. 10 is not relevant to the issues related to this case.

1 The Court is not persuaded that confusion experienced by other users has any bearing on
2 whether Bang Energy's alleged infringement was willful or innocent. Further, the term
3 "any confusion" is vague and unclear. For these reasons, the motion to compel as to RFP
4 No. 10 is DENIED.

5
6 RFP No. 11: Documents related to the number of accounts that have been
7 suspended or terminated on the TikTok platform as a result of alleged or
actual copyright violations from 2016 through the present.²¹

8 RFP No. 12: Documents related to the number and nature of posts removed
9 from the TikTok platform as a result of alleged or actual copyright
infringement violations or copyright infringement allegations from 2016
through the present.

10
11 TikTok has not agreed to produce documents responsive to RFP Nos. 11 and 12 as
12 it contends that information about its suspensions and terminations is neither relevant to
13 the claims and defenses in the Florida Action nor proportional to the needs of the case.²²
14 (Jt. Stip. at 72-73, 75). TikTok receives notices of copyright violations through the
15 DMCA process, which is a shield to liability for TikTok, but does not offer any protection
16 to a user that posts allegedly infringing content. (*Id.* at 73). Furthermore, TikTok argues
17 that whether other users engaged in copyright infringement or had their accounts
18 terminated has no bearing on whether *Movants* engaged in copyright infringement. (*Id.* at
19 74). *Movants* argue that information about other users bears on TikTok's "complex and
20 unclear usage policies and mechanics" and whether and how TikTok informed users of
21 violations of music library uses. (*Id.* at 72, 75). *Movants* contend that evidence of others'
22 confusion will show that they reasonably relied on TikTok's provisioning of access to the
23

24 ²¹ During the meet and confer discussions, *Movants* "clarified" that RFP Nos. 11 and 12
25 seek only information "related to the number of suspended or terminated accounts due to
26 music copyright violations based on music from TikTok's music libraries, not for any
user-supplied music." (Jt. Stip. at 72).

27 ²² Although TikTok did not agree to produce additional documents in response to RFP
28 No. 12, in its written response, TikTok provided links to its Terms of Service and
Intellectual Property policy, which describe the circumstances in which a user account
may be terminated. (Jt. Stip. at 75).

1 songs in its music library and did not intend to infringe any copyrights. (*Id.* at 73, 76).
2 Furthermore, with respect to TikTok’s links to its on-line Terms of Service and
3 Intellectual Property policy in response to RFP No. 12, Movants argue that TikTok’s
4 current Terms of Service and policies “likely reflect a ‘cleaned up’ version of these
5 documents,” even though the Terms of Service were last updated in 2019, a year before
6 the creation of the commercial music library. (*Id.* at 76).

8 DECISION

9
10 The Court finds that the documents sought in RFP Nos. 11-12 are not relevant to
11 the issues in this case. For this reason, the motion to compel as to RFP Nos. 11-12 is
12 DENIED.

13
14 RFP No. 13: Documents sufficient to show TikTok’s process for
15 monitoring and enforcing its policies and procedures regarding the use of
16 music of the TikTok platform, including identification and removal of, and
notifications for, posts that infringe or potentially infringe another’s
copyrighted work.

17 TikTok agreed to produce its Intellectual Property policy in response to RFP No.
18 13, which sets forth TikTok’s “process for monitoring and enforcing its policies and
19 procedures regarding the use of music on TikTok’s platform.” (Jt. Stip. at 79). TikTok
20 states that if Movants require prior versions of its policy, they, like the current policy, are
21 archived on-line. (*Id.*). Additionally, TikTok argues that Movants fail to explain why its
22 internal processes are even relevant and once again appear to misunderstand TikTok’s
23 function as a content host. (*Id.* at 78). Movants state that in addition to TikTok’s notice-
24 and-takedown policy, which concerns acting on reports by parties other than TikTok, they
25 are seeking “documents and information about TikTok’s process and efforts for its own
26 affirmative identification and removal of posts that infringe or potentially infringe on
27 another’s copyrighted work.” (*Id.* at 77). Movants also contend that TikTok’s current
28 policy likely reflects a “cleaned up” version after TikTok addressed claims by music

rights holders for the songs on its platforms. (*Id.* at 78).

DECISION

The Court finds that information related to the monitoring and enforcing of TikTok’s policies and procedures regarding the use of music in its platform is relevant, as is information relating to TikTok’s policies and procedures regarding the removal of posts that infringe, or potentially infringe, copyrighted work. For this reason, the motion to compel as to RFP No. 13 is GRANTED.

RFP No. 14: Documents and communications related to the monitoring, identification, enforcement, and/or removal of posts related to Bang Energy, including for the @bangenergy, @bangenergy.ceo, and other user accounts on the TikTok platform.

TikTok has agreed to produce “communications that relate to the monitoring, identification, enforcement, and/or removal of posts on @bangenergy or @bangenergy.ceo for music copyright reasons.” (Jt. Stip. at 80). Movants state that this is too narrow, as the request seeks communications regarding posts related to the Bang Energy brand, which includes posts by other users on other user accounts, particularly “influencers” who “posted videos that related to Bang.” (*Id.*). TikTok responds that Movants have never identified who these “influencers” or other users are, (*id.*), which it maintains is information that “would be exclusively within [Movants’] possession.” (*Id.* at 81).

DECISION

For the reasons previously stated, the Court will not order production of communications between TikTok and Bang Energy’s “influencers.” For this reason, the motion to compel as to RFP No. 14 is DENIED to the extent that it seeks documents

1 exceeding the scope of TikTok’s agreed-upon production.

2
3 RFP No. 15: TikTok’s monthly analytics data, including the number of
4 followers, profile and video views, engagements, likes, comments, and
5 shares, for the @bangenergy and @bangenergy.ceo accounts from January
6 2016 to the present.

7 TikTok states that it has determined that its systems store a user’s monthly data for
8 only the previous 90 days. (Jt. Stip. at 82). As such, TikTok contends that the request
9 should be denied because it does not have data to respond to the request. (Jt. Stip. at 82).
10 Despite TikTok’s representation, Movants state that “[i]f the data is available for the full
11 requested time period of January 2017 to the present, following a reasonable search and
12 retrieval, it should be produced.” (*Id.* at 81). Movants further note that TikTok never
13 conveyed to them “what specific search and retrieval process was executed, only that its
14 engineers were looking into the retrieval and available data.” (*Id.*)

15 **DECISION**

16
17 Because TikTok has asserted that monthly analytic data is not available, and the
18 Court cannot order production of information and documents that do not exist, the Court
19 will not order such. However, as previously stated, the Court finds that aggregate data
20 from January 1, 2019 to the present related to Movants’ accounts is relevant and must be
21 produced to the extent it exists. For this reason, the motion to compel as to RFP No. 15 is
22 GRANTED IN PART.

V.

CONCLUSION

The Motion to Compel filed by Movants Vital Pharmaceuticals, Inc. is GRANTED IN PART and DENIED IN PART. TikTok shall serve supplemental written responses and produce responsive documents, if any, to the production requests for which a supplemental response is required by this Order within fourteen days of the date of this Order. If no documents exist that are responsive to a production request for which a supplemental response is required, the response shall affirmatively so state. TikTok shall present a corporate witness or witnesses to testify consistent with this Order at a mutually agreeable date at time, but in no case not later than thirty days from the date of this Order.

DATED: June 13, 2022



PEDRO V. CASTILLO
UNITED STATES MAGISTRATE JUDGE